Supreme Court, U.S.
FILED
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(2)

No. 98-1139

In the Supreme Court of the United States

OCTOBER TERM, 1998

EZELL GILBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether carrying a concealed firearm (as defined by Florida law) is a "crime of violence" (as defined in Sentencing Guidelines § 4B1.2(1) (1995)), for purposes of imposing an enhanced sentence under the career offender provision of Sentencing Guidelines § 4B1.1 (1995).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 138 F.3d 1371. The decision of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1998. A petition for rehearing was denied on August 5, 1998 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on November 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of possessing cocaine base with intent to deliver and one count of

possessing marijuana with intent to deliver, both in violation of 21 U.S.C. 841(a)(1). He was sentenced to 292 months' imprisonment, to be followed by five years of supervised release. Pet. App. 2a.

1. On October 11, 1995, a Tampa Police Department surveillance team observed petitioner conducting a number of narcotics transactions from his car. Presentence Report (PSR) (May 30, 1996) ¶ 6. The officers stopped petitioner and asked for his driver's license and registration. PSR ¶ 7. When petitioner opened the glove compartment of his car, a baggie containing cocaine base fell into his hand. PSR ¶ 7. The officers arrested petitioner; a subsequent search of his car revealed marijuana and more cocaine. PSR ¶ 8.

The presentence report recommended that petitioner be sentenced as a "career offender" under United States Sentencing Guidelines Manual (1995) (Sentencing Guidelines) § 4B1.1.[1] PSR ¶ 24. Specifically, the presentence report identified both petitioner's 1990 conviction for possessing cocaine with intent to distribute and petitioner's 1994 conviction for carrying a concealed firearm as prior felony convictions for crimes of violence or controlled substance offenses. PSR ¶¶ 24, 28, 36. The presentence report assumed that carrying a concealed firearm in violation of Florida law[2]

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[1] Sentencing Guidelines § 4B1.1 provides: "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

[2] When petitioner was convicted of carrying a concealed firearm, the Florida statute provided: "Whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of

qualifies as a "crime of violence" as defined in Sentencing Guidelines § 4B1.2.[3] See Addendum to PSR at 2.

At sentencing, petitioner argued that his conviction for carrying a concealed firearm in violation of Florida law did not constitute a "crime of violence" under the career offender Sentencing Guideline. Sent. Tr. (Mar. 13, 1997) 3-4; Sent. Tr. (Mar. 25, 1997) 2-3. The district court rejected that claim and sentenced petitioner as a career offender under Sentencing Guidelines § 4B1.1. Pet. App. 2a.

2. The court of appeals affirmed. Pet. App. 1a-13a. The court concluded that the Florida crime of carrying a concealed firearm is a "crime of violence" under Sentencing Guidelines § 4B1.2(1), because it involves conduct that "presents a serious potential risk of physical injury" to another. Pet. App. at 4a. See Sentencing Guidelines § 4B1.2(1)(ii). The court of appeals acknowledged that it had "never reached the precise question whether carrying a concealed firearm is a 'crime of vio-

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the third degree." Fla. Stat. Ann. § 790.01(2) (West 1992 & Supp. 1999).

[3] Section 4B1.2(1) of the Sentencing Guidelines in effect at the time provided:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

lence' as defined by [Sentencing Guidelines] § 4B1.2(1)." Pet. App. 3a. The court explained, however, that it had previously held that carrying a concealed firearm under Florida law is a "violent felony" under the federal Armed Career Criminal Act, 18 U.S.C. 924(e), because the crime involves conduct that "presents a serious potential risk of injury." Pet. App. 4a (citing *United States* v. *Hall*, 77 F.3d 398 (11th Cir.), cert. denied, 519 U.S. 849 (1996)). Noting that the relevant provision of the statutory definition of "violent felony" is the same as the relevant provision of the Sentencing Guidelines definition of "crime of violence," the court of appeals reasoned that "*Hall*'s conclusion applies equally to the question at hand here." Pet. App. 4a. Thus, the court of appeals held that "carrying a concealed weapon in violation of Florida law is a 'crime of violence' under" Sentencing Guidelines § 4B1.2(1). Pet. App. 5a.

ARGUMENT

Petitioner contends (Pet. 7-10) that his Florida conviction for carrying a concealed weapon is not a "crime of violence" as defined in Sentencing Guidelines § 4B1.2(1), and therefore that he was improperly sentenced as a career offender under Sentencing Guidelines § 4B1.1. Because the decision below is correct and does not conflict with any decision of this Court or any other court of appeals, this case does not warrant further review.

1. The Eleventh Circuit's decision in this case—that carrying a concealed weapon in violation of Florida law is a "crime of violence" within the scope of Sentencing Guidelines § 4B1.2(1)—is correct. Pet. App. 4a. The court properly recognized that carrying a concealed weapon would qualify as a "crime of violence," as defined in Sentencing Guidelines § 4B1.2(1)(ii), only if it

"presents a serious potential risk of physical injury." Pet. App. 4a. The court of appeals concluded that carrying a concealed weapon does indeed present such a risk. *Ibid.* Rather than discussing its reasoning at length, however, the court referred to its decision in *United States* v. *Hall*, 77 F.3d 398 (11th Cir. 1996), which applied the same definition (i.e., "presents a serious potential risk of physical injury") in concluding that carrying a concealed weapon is a "violent felony" under the Armed Career Criminal Act. See Pet. App. 4a; *Hall*, 77 F.3d at 401.

In *Hall*, the court explained that, unlike "mere possession" of a firearm, "carrying a concealed weapon is an active conduct crime" in which the gun carrier "has taken the extra step of having the weapon immediately accessible for use on another" and therefore "poses serious potential risk of physical injury." 77 F.3d at 401. The court of appeals noted that the Florida offense of carrying a concealed firearm requires both (1) that the firearm be physically carried on the defendant's person or readily accessible to him, and (2) that the firearm be hidden from sight. *Hall*, 77 F.3d at 402 n.4. The court correctly concluded that those statutory elements create the "likelihood of immediate violence," *ibid.*; a person concealing a firearm on his person or in an otherwise readily accessible place will, by definition, be readily able to inflict serious physical injury on another and, by arming himself with a concealed weapon, has indicated some readiness to resort to violence. Under Florida law, therefore, carrying a concealed weapon is an offense that "presents a serious potential risk of physical injury to another," under both Sentencing Guidelines § 4B1.2(1)(ii) (the provision at issue in the present case) and 18 U.S.C. 924(e)(2)(B)(ii) (the statute at issue in *Hall*).

2. Petitioner does not cite—and we have not located—any other court of appeals decision considering whether carrying a concealed weapon is a "crime of violence" under Sentencing Guidelines § 4B1.2(1). Accordingly, the Eleventh Circuit's holding in this case does not conflict with any holding of this Court or any circuit court. Rather, petitioner (Pet. 6-8) points to an apparent conflict between *United States* v. *Hall*, *supra*, and *United States* v. *Whitfield*, 907 F.2d 798 (8th Cir. 1990), on the question whether carrying a concealed weapon is a "violent felony" for purposes of the the Armed Career Criminal Act, 18 U.S.C. 924(e).[4] Although the Eighth and Eleventh Circuits do seem to split on that question, see *United States* v. *Frazier-El*, 10 F. Supp.2d 508, 510-511 (D. Md. 1998) (recognizing conflict), resolving that potential disagreement regarding the Armed Career Criminal Act will not benefit petitioner, who was neither charged nor punished under that Act.

Moreover, whether a state conviction qualifies as a "violent felony" under the Armed Career Criminal Act turns on the relevant state law. See *Taylor* v. *United States*, 495 U.S. 575 (1990) (generally requiring courts to rely on the statutory definition of elements of crimes in applying Armed Career Criminal Act). Accordingly, the treatment of crimes, such as concealed weapons offenses, may vary under the Armed Career Criminal

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[4] *United States* v. *Johnson*, 704 F. Supp. 1403, 1407 (E.D. Mich. 1989), aff'd, 900 F.2d 260 (6th Cir. 1990) (Table) (1990 WL 47483), also held that carrying a concealed weapon was not a "violent felony" for purposes of the Armed Career Criminal Act. The Sixth Circuit, in an unpublished disposition, affirmed the district court's ruling, but did not discuss whether the crime of carrying a concealed weapon under Michigan law is a "violent felony" under the Armed Career Criminal Act. See 1990 WL 47483.

Act depending on how each State construes the particular elements of the offense. This Court's resources are not well spent examining a question so linked to state law determinations, where the outcome could vary in each State. Cf. *Salve Regina College* v. *Russell*, 499 U.S. 225, 235 n.3 (1991) (referring to "several cases in which this Court declined to review *de novo* questions of state law").

3. Even if there were a conflict among the courts of appeals on the question whether carrying a concealed firearm falls within the definition of "crime of violence" in Sentencing Guidelines § 4B1.2(1)(ii), and there is no such conflict, the issue is one that the United States Sentencing Commission is fully capable of resolving. In *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991), this Court recognized that Congress expected the Commission to review judicial decisions and to promulgate clarifying amendments on Guidelines sentencing issues that divide the lower courts. Accordingly, the intervention of this Court is not required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999